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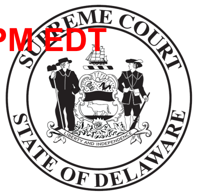


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| F.A.M.E. LLC d/b/a Falk Associates Management Enterprises a/k/a FAME, | ) | |
| | ) | Case No. 230, 2025 |
| Appellant/ Plaintiff-Below, | ) | |
| | ) | Appeal from the Superior Court of the State of Delaware |
| v. | ) | C.A. No. N22C-12-003-PAW CCLD |
| | ) | |
| EMTURN LLC and EVAN TURNER, | ) | **PUBLIC VERSION EFILED ON SEPTEMBER 5, 2025** |
| | ) | |
| Appellees/ Defendant-Below | ) | |

**DEFENDANTS-BELOW/APPELLEES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL**

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August 21, 2025

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## NATURE OF THE PROCEEDINGS

This is a fee dispute between sports agent David Falk ("Falk") of F.A.M.E. LLC ("FAME") and his former client, NBA star Evan Turner ("Turner"). FAME claims it is due a fee on stock that Turner's loan-out company EmTurn LLC ("EmTurn," and together with Turner, simply "Turner") received in an endorsement deal with Chinese shoe company Li-Ning ("Li-Ning"), granting Turner cash and restricted stock units in Li-Ning, a publicly traded company. FAME's oral and written agreements with Turner (collectively, the "FAME Agreement") say nothing about stock but instead provide that FAME is due a fee on "marketing income." The parties dispute whether "marketing income" includes stock. They further dispute when FAME's claim to a fee on stock accrued for statute-of-limitations purposes.

The Trial Court held on summary judgment that "marketing income" under the FAME Agreement includes stock, *but* that FAME's claim to a fee on stock accrued when the stock vested. Because the last of the stock vested in July 2016, more than three years before FAME commenced this action, the Trial Court held FAME's sole remaining claim for breach of contract is time-barred.[1]

FAME appeals the Trial Court's ruling, arguing that the statute of limitations

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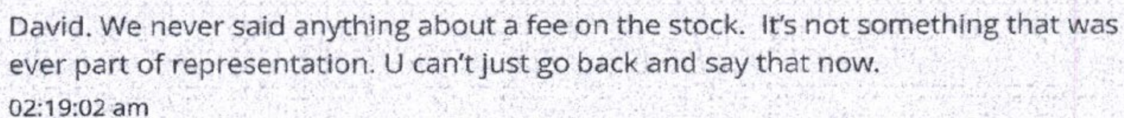
[1] FAME also asserted several other tort and quasi-contractual claims, but those claims were either voluntarily withdrawn by FAME or dismissed by the Trial Court. FAME does not appeal the Trial Court's dismissal of any of its other claims.

did not accrue when the stock vested but rather when Turner sold the stock several years later. The Trial Court correctly rejected that argument because the money Turner received from selling the stock was not "marketing income" under the plain meaning of those words. The Trial Court also held that the parties' course of performance showed that fees were due when "marketing income" was received—the point in time at which the stock was first considered income—and there is no dispute that Turner received the stock when it vested.

This Court should affirm the Trial Court's ruling on statute-of-limitations grounds and thus need not reach the question of whether stock was commissionable "marketing income" to begin with. But if the Court does reach the latter question, it should hold the Trial Court erred in concluding that the FAME Agreement unambiguously provides for a fee on stock. The FAME Agreement provides no definition for the term "marketing income," leaving open for interpretation whether non-cash benefits are included. It is undisputed the parties never discussed a fee on stock, and the FAME Agreement does not mention anything about a fee on stock. Falk's partner in FAME, Danielle Cantor ("Cantor"), acknowledged this in a text-message to Falk:


David. We never said anything about a fee on the stock. It's not something that was ever part of representation. U can't just go back and say that now.
02:19:02 am

(A806.)

## SUMMARY OF ARGUMENT

As to Appeal:

1. Denied. The Trial Court correctly concluded that the parties' course of performance shows that a fee on the Li-Ning stock was due, if at all, when the stock vested because that is when Turner received the stock as "marketing income" under the FAME Agreement, and FAME's historical practice was to invoice Turner when he received marketing income. FAME argues that summary judgment on that issue was improper because the parties' course of performance could just as easily be viewed as showing that FAME invoiced Turner when he received cash, and Turner did not receive cash from the Li-Ning stock until he sold it years later.

FAME's argument fails because, whereas the Trial Court's interpretation of the parties' course of performance is in harmony with the plain language of the FAME Agreement, FAME's interpretation is in direct conflict with it. The Trial Court correctly held that the term "marketing income" unambiguously does *not* apply to the cash Turner received from selling the stock. FAME did not appeal that portion of the Trial Court's ruling and has thus waived any contrary argument. Nor may FAME defeat the "marketing income" limitation of the FAME Agreement by arguing that the parties' course of performance was to bill based on cash without regard to whether that cash was "marketing income." To allow FAME to use course

of performance evidence to enlarge its right to a fee beyond “marketing income”—the meaning of which is now settled—would improperly elevate extrinsic evidence above plain contract language.

As to Cross-Appeal:

2. In the event the Court does not affirm the Trial Court’s judgment on statute-of-limitations grounds, the Court should hold that the Trial Court erred in concluding that the FAME Agreement unambiguously provides for a commission on stock. Fees were to be based on undefined “marketing income.” Conspicuously absent from the FAME Agreement is any mechanism for determining how or when a stock commission would be paid or measured. In light of that glaring omission, and absent any objective manifestation of intent that stock be commissionable (the parties never discussed a fee on stock), it is at least equally reasonable to interpret the term “marketing income” in the FAME Agreement to exclude stock.

3. In the event the Court does not affirm the Trial Court’s judgment on statute-of-limitations grounds, the Court should further hold that the Trial Court erred in not applying the doctrine of *contra proferentem*. Because it is undisputed that the parties did not discuss whether stock was “marketing income” and because that term could reasonably be interpreted to exclude stock, the ambiguity must be resolved against FAME as the drafter of the FAME Agreement.

## STATEMENT OF FACTS

### A. Falk recruits Turner

Turner was 22 years old when he left college during his junior year at The Ohio State University and entered the NBA draft in 2010. (A34, ¶ 18.) Playing basketball came easy to Turner. But the *business* of basketball was a new frontier. To guide him, Turner signed with FAME, whose founder David Falk he had idolized from a young age as the legendary agent to Michael Jordan. (A367, 371, 377, 26:13–20, 42:13–16, 67:8–21.)

Falk recognized that, "[l]ike most rookies," Turner was "very unsophisticated" and "inexperienced." (A244, 125:18–21.) For Falk, however, the dizzying world of NBA stardom was old hat. According to Falk, he is "generally considered the most influential player agent in NBA history." (A31, ¶ 8.) When he signed Turner, Falk was 50 years into his career, buoyed by an impressive record that included negotiation of Michael Jordan's legendary "Air Jordan" deal with Nike, negotiation of professional basketball's first $100 million contract, and portrayal in a major motion picture (*Air*, 2023) highlighting Falk's reputation for hard-nosed negotiating tactics. (A31, ¶ 8.)

### B. The FAME Agreement

Not subject to negotiation, however, was Falk's contract with Turner, the terms of which Falk first shared orally and then confirmed in a written agreement

signed by Turner on September 9, 2010 (together, the "FAME Agreement").[2] (A34, ¶ 19; A773-74.) The FAME Agreement is the same agreement Falk presents to all of his players. Falk testified, "I wrote the agreement. And I have written this same agreement, essentially this same agreement, for 50 years with hundreds of players." (A243, 123:3–6.) Falk refused to accept any changes to his form: "I told Evan at the very beginning, you know, we weren't—we weren't going to change the terms." (A257, 178:11–13.) "[T]o close the deal" Falk reduced his 20% commission to 15% for years in which marketing income was less than $2 million, but Falk denied that was the product of negotiation, which Falk considered himself above. (A244, 128:4–19.) "It's a really terrible way to start a relationship to feel you have to negotiate with your clients," Falk testified. (*Id*. at 128:14–16.) So "I didn't negotiate it. I made a concession …." (*Id*. at 128:11–12.) And Turner "signed off on the contract exactly as it's written." (A270, 229:14–15.)

Over the course of his long career, Falk has never sought or received a fee on equity-based compensation obtained by a client, except from Turner. (A273, 242:18–22.)

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[2] The parties agree that the terms of the written and oral agreements are identical. (*See* Ex. A to Appellant's Opening Br. ("FAME Br.") (Mem. Op. & Order, dated April 25, 2025 ("Op. & Order")), at 7 ("There is no dispute that the Written Agreement was identical in all material aspects to the Oral Agreement.").)

### C. The Li-Ning deal

Before Turner had even signed the FAME Agreement, Falk had already secured for him the Li-Ning endorsement deal that is the subject of this case. Falk had started negotiating with Li-Ning months before, in June 2010. (A269, 226:8–17.) The final agreement was a 6-year contract paying Turner $2.5 million/year in cash compensation, plus royalties and bonuses, along with 1,000,000 shares of Li-Ning stock set to vest over the 6-year contract term. (A741-764.) With respect to the stock, the Li-Ning agreement contained the following vesting schedule:

**Schedule C**

Li Ning Restricted Stock:

| | Number of Shares | Grant Date | Vesting Date |
|---|---|---|---|
| Contract Year 1 | 100,000 | August 23, 2010 | July 1, 2011 |
| Contract Year 2 | 120,000 | August 23, 2010 | July 1, 2012 |
| Contract Year 3 | 170,000 | August 23, 2010 | July 1, 2013 |
| Contract Year 4 | 170,000 | August 23, 2010 | July 1, 2014 |
| Contract Year 5 | 220,000 | August 23, 2010 | July 1, 2015 |
| Contract Year 6 | 220,000 | August 23, 2010 | July 1, 2016 |

(A764.)

### D. FAME first mentions a fee on stock after being terminated

Turner received the Li-Ning stock in accordance with the contract's vesting schedule. Initially the stock performed very poorly, declining from $3.60/share in 2010 to around $0.40/share in 2016. (A802.) Up to that point in time, FAME had

never mentioned taking a fee on the stock. That changed when Turner terminated FAME in May 2016. A month later, FAME sent Turner's financial advisor Steve Vujevich the following email:

Steve:

Per your conversation with David, when Evan receives this last 220,000 shares of Restricted Stock from Li Ning, he will have received the full 1,000,000 shares David negotiated for him in his Li Ning contract. The stock price is quite low now, approximately $0.40 per share. We need to determine when Evan will sell these shares and pay FAME its 20% fee of their value.

Best regards,
David and Danielle

(*Id.*)

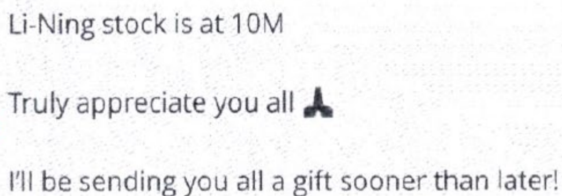
Cantor did not want to send that email. (A283, 281:8–11.) Falk testified "she said, like, 'Why do you want me to send the e-mail? The stock's at $0.40. The commission's going to be worth enough to buy a cup of coffee.'" (*Id.*) Indeed, as Cantor would later tell Falk, she did not believe FAME was entitled to *any* commission on the stock because FAME never said anything to Turner about a fee on stock. (A806.) Falk instructed Cantor to send the email anyway, and she did. (A283, 281:12–18; A144-45, 224:3–226:2.)

Vujevich never responded to Cantor's email, and FAME never followed up. (A148, 237:2–239:2; A279, 266:12–16.) Three months later, FAME sent EmTurn its final invoice for the commission on the "FINAL PAYMENT OF LI NING CONTRACT," which EmTurn paid. (B0012.) Nowhere in that invoice was the

stock mentioned. (*Id.*) For the next *five years*, Turner never heard a word from FAME regarding his stock. (A148, 237:2–239:2; A279, 266:12–16.)

### E. FAME claims a fee after learning the stock price went up

Li-Ning's stock price climbed after FAME was terminated, rising to more than $10 per share in 2021. (A279, 267:1–7.) On June 30, 2021, five years after he terminated FAME, Turner sent the following text message to Falk and Cantor:

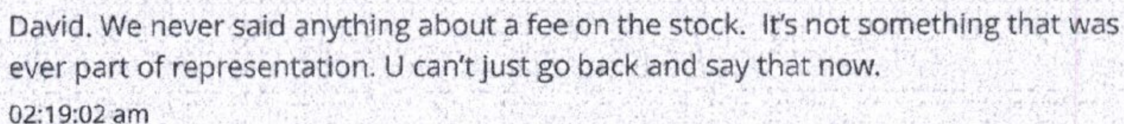

Li-Ning stock is at 10M

Truly appreciate you all 🙏

I'll be sending you all a gift sooner than later!

(A804.)

Turner had no expectation of owing FAME a fee on the stock as shown by his offer of a "gift," but Falk suddenly saw dollar signs. "We should get a fee from [Turner] for stock!!" he texted Cantor minutes later. (A806.) "He was very nice. Said he was sending gifts," Cantor responded. (*Id.*) "But Q is what is value of stock we got him," Falk replied. (*Id.*) "If it's worth $10 mil, he would owe us $1.35 million … That's more than a gift." (*Id.*) Cantor disagreed:


David. We never said anything about a fee on the stock. It's not something that was ever part of representation. U can't just go back and say that now.
02:19:02 am

(*Id.*)

But Falk was undeterred.  After learning Turner sold some of the stock, Falk messaged Vujevich in May 2022 demanding he convince Turner to pay Falk a fee. (B0005-07, B0009-10.)  When Vujevich did not deliver, FAME invoiced Turner for a fee on the stock sales.  (B0003.)  FAME commenced this lawsuit on December 1, 2022.

# ARGUMENT

## I. THE TRIAL COURT CORRECTLY HELD THAT THE PLAIN LANGUAGE OF THE FAME AGREEMENT ESTABLISHES THAT STOCK WAS "MARKETING INCOME," IF AT ALL, WHEN IT VESTED AND NOT WHEN IT WAS SOLD.

### A. Question Presented

Assuming "marketing income" under the FAME Agreement includes stock, when was the Li-Ning stock "marketing income" to Turner? (A645-50.)

### B. Scope of Review

This Court "review[s] contract interpretation *de novo*." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012). The Court "review[s] the trial judge's grant of summary judgment *de novo* as well, to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Id.* (cleaned up). The Court "may affirm a grant of summary judgment on grounds other than those on which the trial judge relied." *Id.*

### C. Merits of Argument

#### 1. FAME did not appeal and has thus waived any argument challenging whether Turner's stock shares constituted "marketing income," which the Trial Court relied upon as an independent ground in reaching its judgment.

FAME's appeal raises a singular assignment of error: that "[t]he Trial Court erred in granting summary judgment by making findings of genuinely disputed fact

regarding the parties' course of performance, and thus holding that the statute of limitations barred FAME's breach of contract claims." (FAME Br., 3.) As set forth below, the Trial Court made no such error. But the parties' course of performance was only one basis for the Trial Court's holding on the statute of limitations. The other basis was the plain language of the FAME Agreement. The Trial Court held that "both extrinsic evidence *and the FAME Agreements' text* confirms FAME's breach of contract claims accrued when the Stock vested on July 1, 2016." (Op. & Order, 22 (emphasis added).)

Delaware Supreme Court Rule 14(b)(vi)(A)(3) states that "[t]he merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." The Court has recognized that "[t]he rules of this Court specifically require an appellant to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief," and, "[i]f an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned that issue on appeal irrespective of how well the issue was preserved at trial." *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004); *see also Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.").

In its decision, the Trial Court held that the plain meaning of "marketing income" (adduced from dictionary definitions of "marketing" and "income") could apply to the Li-Ning stock only when it vested because that is when "Turner received the Stock as payment for his efforts encouraging people to buy Li-Ning shoes" (*i.e.*, Turner's marketing services). (Op. & Order, 20–21.) "Conversely," the Trial Court concluded that "the money Turner received from the Stock sale was not due to any marketing efforts …. Therefore, FAME's argument that the Stock was commissionable at the time of sale, impermissibly excludes the term 'marketing' from the FAME Agreements." (*Id*. at 21–22.)

Nowhere in FAME's Brief does it assign error to, or even discuss, the Trial Court's holding as to the plain language of the FAME Agreement. Accordingly, FAME has waived any argument that the Li-Ning stock was "marketing income" under the FAME Agreement *at any time other than* when the stock vested. At the same time, as set forth below, FAME's only argument in this appeal—that the parties' course of performance shows a fee was due upon sale rather than vesting—directly contradicts the Trial Court's holding as to the meaning of "marketing income." Because FAME did not appeal that holding, its assignment of error regarding the parties' course of performance necessarily fails.

### 2. Even if FAME did not waive its argument on the meaning of "marketing income," the Trial Court correctly interpreted the parties' course of dealing to determine that any fee was owed when the stock vested.

The Trial Court's analysis started, as it should have, with the language of the FAME Agreement, which provides that FAME shall receive a fee on "marketing income." Because "marketing income" is not defined in the FAME Agreement, the Trial Court consulted dictionaries to ascertain its meaning. This was the correct approach. "Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract, as dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract." *Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *4 (Del. Ch. Mar. 19, 2021).

The Trial Court then logically applied the dictionary definitions of "marketing" and "income" to determine when the Li-Ning stock was "marketing income" to Turner. The Trial Court correctly held that the stock was "marketing income," if at all, when the stock vested because, "[u]pon vesting, Turner received the stock as payment for his efforts encouraging people to buy Li-Ning shoes" (*i.e.*, the dictionary definition of "marketing"). (Op. & Order, 20.) And the Trial Court correctly rejected FAME's argument "that the Stock was commissionable at the time

of sale" because that interpretation "excludes the term 'marketing' from the FAME Agreements." (*Id*. at 21–22.) The Trial Court appropriately gave "each provision and term effect, so as not to render any part of the contract mere surplusage." *Sunline Commer. Carriers, Inc. v. CITGO Petro. Corp.*, 206 A.3d 836, 839 (Del. 2019) (internal quotation marks omitted).

The drafter of the FAME Agreement—Falk—supports the Trial Court's reasoning. Falk agrees that "when you initially receive stock, it's universally regarded as compensation without exception." (A225-26, 52:18–53:1.) The parties agree that the term "compensation," which also appears in the FAME Agreement, is interchangeable with "marketing income." (Op. & Order, 13 ("[T]here is no dispute that: (1) the parties used the terms 'compensation' and 'marketing income' interchangeably ….").) Conversely, Falk admits that the appreciation in the value of the stock had nothing to do with Turner's marketing services. As Falk testified:

> You asked me did I think that Evan's services during the 6 years of the contract, were they responsible for the stock going to $10 million. And the answer factually is no. They have caused the stock to go down. The stock went down 90 percent during the 6 years that Evan Turner provided his services to Li-Ning.

(A242, 117:5–15.)

Federal tax law also supports the Trial Court's reasoning that the stock was "compensation" or "marketing income" only when it vested and not when it was sold. Treasury regulations provide that "if property is transferred to an independent

contractor, as compensation for services … the difference between the amount paid for the property and the amount of its *fair market value at the time of the transfer is compensation* and shall be included in the gross income of the … independent contractor." Treas. Reg. § 1.61-2(d)(2) (emphasis added). This is precisely why Turner paid taxes on the Li-Ning stock upon vesting. (A249, 146:15–22.)

Conversely, money received from selling stock is not treated as compensation under the tax code. Instead, any compensation attributable to the receipt of the stock becomes the tax basis of the stock "[i]n computing the *gain or loss from the subsequent sale* of such [stock] …." Treas. Reg. § 1.61-2(d)(2) (emphasis added). If there is a gain, it is taxed not as additional compensation income but as capital gain. *See* 26 U.S.C. § 1001; *see also*, *e.g.*, *Ellis, Holyoke & Co. v. Comm'r of Internal Revenue*, 1970 WL 2118 (U.S. Tax Ct. Jan. 15, 1970) (noting prior holding, where taxpayer received stock at bargain price as compensation for services, "that the difference between the price he paid and the value of the stock when acquired represented compensation, and that the additional price he later received upon the sale was capital gain") (citing *Husted v. Comm'r of Internal Revenue*, 47 T.C. 664 (1967)); *Greiner v. U.S.*, 122 Fed. Cl. 139, 147 (2015) (recognizing sale of capital asset received in exchange for services "would have triggered long-term capital gains (not ordinary compensation income)").

Accordingly, the Trial Court correctly held that the only way to align the meaning of a fee on stock with the terms of the FAME Agreement is to treat the stock as "marketing income" on the dates the stock vested. If FAME had a right to a fee on stock, that is when it arose, that is when the breach occurred, and that is when the statute of limitations began to run.

## II. FAME FAILED TO DEMONSTRATE THE EXISTENCE OF ANY GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO THE PARTIES' COURSE OF PERFORMANCE.

### A. Question Presented

Whether the Trial Court correctly found that the parties' course of performance confirms that a fee on the Li-Ning stock was due, if at all, at vesting. (Op. & Order, 19-22; A645-51.)

### B. Scope of Review

Questions of contract interpretation on summary judgment are reviewed *de novo*. *See* discussion *supra* at Section I.B.

### C. Merits of Argument

The Trial Court concluded the FAME Agreement was ambiguous "regarding when payment *is due*" because the FAME Agreement states only that "FAME shall receive a Marketing Fee" without specifying a date for payment. (Op. & Order, 19 (emphasis added).) This is a separate question from when "marketing income" *was received*. As set forth above, the Trial Court held that Turner received "marketing income" from the Li-Ning stock when it vested.

As to the time for payment of FAME's "Marketing Fee" on Turner's "marketing income" from the Li-Ning stock, the Court looked to extrinsic evidence, in particular the parties' course of performance, which showed that "FAME always sent its Marketing Fee invoice when Turner received compensation from Li-Ning."

(*Id.*) Because there is no dispute that Turner received the stock as compensation when it vested, the Trial Court logically concluded that "[t]he parties' course of performance shows that Defendants' obligation to pay the Marketing Fee on the Stock, arose when the Stock vested." (*Id.* at 19–20.)

FAME does not dispute the facts on which the Trial Court based this holding—there is no factual dispute here, even according to FAME. Instead, FAME argues that the same undisputed facts concerning the parties' course of performance show that FAME invoiced Turner not when he received "compensation," but rather when he received "cash" from Li-Ning. (FAME Br., 23.) Thus, FAME argues, the parties' course of performance shows that FAME's Marketing Fee was due not when Turner received the stock but rather when he sold it and received the cash proceeds.

Although FAME's creative interpretation of the parties' course of performance is not technically incorrect, it is completely untenable. FAME invoiced Turner whenever he received compensation. Aside from the Li-Ning stock, Turner only ever received compensation from Li-Ning in the form of cash. So, without another form of compensation to compare to, FAME's invoicing when Turner received *compensation* could be construed, on the surface, as invoicing when Turner received *cash*. But this interpretation breaks down when looking to the North Star that guides contract interpretation: the plain language of the contract. The FAME Agreement provides for a fee only on "***marketing*** income" / "compensation."

FAME's course of performance argument would give FAME a fee on "cash" proceeds from Turner's years-later stock sales that—as held by the Trial Court in a ruling FAME does not challenge on appeal—had nothing to do with Turner's ***marketing*** services for Li-Ning. FAME's argument therefore improperly seeks a fee on ***non-marketing*** income.

#### 1. FAME seeks to use extrinsic evidence to contradict the plain language of the FAME Agreement.

The FAME Agreement does not provide for a fee on "cash." The FAME Agreement provides for a fee on "marketing income," which the parties used interchangeably with "compensation." (*See* Op. & Order, 15.) The cash Turner received when he sold the Li-Ning stock was not marketing income (or compensation) because it was "not due to any marketing efforts," (*id*. at 21), as FAME readily admitted in sworn testimony. (A241, 116:6–16.) FAME essentially asks this Court to ignore the language of the contract and hold that, based on course of performance, it was entitled to bill based on Turner's receipt of cash regardless of whether the cash constituted marketing income. FAME has the analysis backwards.

"To interpret a contract, the Court first looks to the plain language as evidence of the parties' intent." *Hampton v. Turner*, 2015 WL 1947067, at *3 (Del. Ch. Apr. 29, 2015). The Court may resort to extrinsic evidence of the parties' intent, such as the parties' course of performance, if it finds the contract to be ambiguous. *See*

*Salamone v. Gorman*, 106 A.3d 354, 374–75 (Del. 2014). Such extrinsic evidence may be used to supplement, but not to contradict, the terms of the contract. *See Alliance Data Sys. Corp. v. Blackstone Cap. Partners V L.P.*, 963 A.2d 746, 769 (Del. Ch. 2009) (holding a party's "attempt to introduce extrinsic evidence to contradict the plain terms of the Merger Agreement is not permitted by the contract law of this state").

The Trial Court followed those principles. On one of its two grounds for summary judgment, the Trial Court held the FAME Agreement ambiguous on the narrow question of "when payment is due," and considered extrinsic evidence of the parties' course of performance. (Op. & Order, 19.) The Trial Court's conclusion that the parties' course of performance was to pay a fee when "marketing income" was received is in harmony with the FAME Agreement's text, which limits FAME to a fee on "marketing income."

FAME's interpretation of the same course of performance evidence, on the other hand, directly contradicts the language of the FAME Agreement. The Trial Court found held that, "[u]pon vesting, Turner received the Stock as payment for his efforts encouraging people to buy Li-Ning shoes" (the dictionary definition of "marketing"), and, thus, "[a]t that point, the Stock was marketing income …." (*Id.* at 20–21.) "Conversely, the money Turner received from the Stock sale was not due

to any marketing efforts" and was thus not "marketing income" subject to FAME's fee. (*Id*. at 21.)

Although FAME does not challenge these conclusions on appeal, it asserts a skewed interpretation of the course of performance to support a different result. After describing the five-step invoicing process used by the parties, FAME argues that because it only ever invoiced Turner when he received *cash* compensation, this course of performance shows that it would only invoice other forms of compensation when they were *converted* to cash. (FAME Br., 9.) This distinction is illusory. Aside from the Li-Ning stock at issue, Turner never received anything *but* cash compensation. As convenient as it is for FAME to gloss over this fact, it could just as easily be argued that the parties had *no* course of performance concerning non-cash compensation. It is undisputed that FAME never sent Turner invoices for the stock, either when it vested or was sold, until the singular invoice sent years later in 2022. The parties therefore never had any course of performance for commissioning a fee on non-cash compensation. At most, the parties' course of performance aligns with the Trial Court's conclusion that FAME invoiced Turner when he received *compensation*. Although FAME attempts to create a factual issue on this point, FAME has not and cannot cite to one material fact that is actually disputed regarding the parties' course of performance.

Rather, what FAME argues under the guise of "course of performance" is that its right to a fee should be enlarged far beyond "marketing income" to extend to any cash Turner received that indirectly flowed from marketing income. By seeking a fee on the sale proceeds from Li-Ning stock rather than the stock itself, FAME would capture a commission not only on the value of the stock when Turner received it but also on the millions of dollars in capital gains Turner received when he sold it, even though those capital gains are indisputably not connected to endorsement activities and in no way "marketing income." FAME claims its interpretation is somehow meant to protect Turner's interests (FAME Br., 26–28), but the FAME Agreement, drafted by FAME, limits FAME to a fee on "marketing income," and the Court's inquiry must end there.

"In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). To adopt FAME's interpretation of when payment is due would give no effect to the term "marketing income" and would effectively write that term out of the FAME Agreement. Well-settled Delaware law forbids such a result.

### 2. FAME's interpretation is patently unreasonable.

FAME's argument that a fee on stock was due upon sale not only contradicts the plain terms of the FAME Agreement, it is also patently unreasonable.

Under Delaware law, "[w]here a contract is silent on the time given to a party to perform a condition, then this Court will assume that the parties contemplated a reasonable time." *White v. Russell*, 2023 WL 3191746, at *6 (Del. Ch. May 2, 2023) (internal quotation marks omitted). "What is reasonable depends on the circumstances of the underlying transaction and the hardship imposed by the alleged delay." *Id*. That test obviously imports some latitude to the court in determining the time for payment, but FAME's interpretation stretches the term "reasonable" far beyond its outermost limits.

Indeed, under FAME's interpretation, there is *no* deadline for payment of a fee on stock, but rather merely a floating, and thus illusory, obligation that hinges entirely on when, if at all, FAME's client decides to sell stock. Falk testified that, under his interpretation, a fee on stock could be due "one year from now, or 50 years from now" depending entirely on how long his client holds the stock. (A284-85, 288:2–289:9.) "I might not be alive," Falk acknowledged. (A233, 81:3–12.) "Maybe my estate would own a piece of the fee." (*Id*.)

Consider the outcome if the roles were reversed, and Turner was arguing that he would pay FAME its commission in 50 years, or maybe not at all, depending on whether and when Turner decided to sell the stock. A court would have no trouble finding that interpretation illusory and thus unreasonable as a matter of law. *See In re Shorenstein Hays–Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del.

2019) (finding that the court "will not read a contract to render a provision or term meaningless or illusory") (internal quotation marks omitted); *Silverman v. Alpart*, 282 A.D. 631, 634 (N.Y. Sup. A.D. 1953) ("It is not within reasonable human experience that these parties intended to make a contract of the nature now claimed by defendant, performance of which could be indefinitely delayed."). But that is exactly the interpretation FAME is asking the Court to reach, and FAME has therefore failed to identify any genuine issue of material fact precluding summary judgment.

## III. CROSS-APPEAL, ASSIGNMENT OF ERROR NO. 1: THE TRIAL COURT ERRED IN HOLDING THAT THE FAME AGREEMENT UNAMBIGUOUSLY PROVIDES FOR A COMMISSION ON STOCK.

### A. Question Presented

In the event the Court declines to affirm the Trial Court's judgment based on the statute of limitations, did the Court err in ruling that the FAME Agreement unambiguously provides for a fee on stock to begin with? (A638-41.)

### B. Scope of Review

See discussion *supra* at Section II.B.

### C. Merits of Argument

In concluding that the term "marketing income" includes stock, the Trial Court interpreted that term in isolation. Defendants acknowledge that the term "marketing income," read in isolation, could be susceptible to an interpretation that includes certain stock rights. But "[w]ords do not exist in isolation," *SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047, at *5 (Del. Ch. May 19, 2023), "[s]o contracts cannot be construed in isolation either." *Id*. "Quite the opposite: In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein." *Id*. (internal quotation marks omitted). "A particular word or phrase cannot be read to pollute the larger linguistic sea in which it swims." *Id*.

Here, the sea in which the term "marketing income" swims—*i.e.*, the FAME Agreement as a whole—is devoid of any of the other sea-life one would expect to encounter if the parties had intended a fee on stock. Together, Falk and Cantor identified at least three ways a fee on stock can be structured: (1) "by the agency taking their appropriate percentage of the number of shares issued," which Falk acknowledges is an "acceptable way to do it"; (2) by taking a fee "on the amount of cash the player derives when he sells the equity," which Falk characterized as "[t]he other extreme"; and (3) by taking "[c]ash compensation … based on the value … of the equity." (A231, A285, 75:13–76:13, 290:21–291:5; A100, 45:5–14.) "I think different agents do it in different ways," Cantor testified. (A100, 45:9–10.) And yet nowhere in the FAME Agreement does it state how FAME intended to commission stock.

The FAME Agreement is silent on even the most basic issues one would expect to see addressed in an agreement providing for a fee on stock: Is the commission payable in stock or cash? How is the commission calculated? When is the commission due? Falk kept the FAME Agreement silent on these fundamental questions; now with the hindsight benefit of seeing how the stock performed, he cherry-picks the interpretation that would get him the richest fee. Had the Li-Ning stock vested at a high price rather than a low one, Falk could just as easily have argued that he was due a fee based on the value of the stock when it vested. But,

because FAME's commission based on the value at vesting was only "going to be worth enough to buy a cup of coffee," Falk decided "[w]e're not going to bill him till he sells it." (A283, 281:8–18.)

Falk's make-it-up-as-you-go-along approach to contract interpretation is at odds with Delaware law. "[T]he meaning of a properly formed contract must be shared or common." *Archkey Intermediate Holdings Inc. v. Mona*, 302 A.3d 975, 989 (Del. Ch. 2023). And there is no indicia whatsoever in the FAME Agreement that the parties shared an understanding that stock was commissionable. To the contrary, the absence of even the most rudimentary terms surrounding stock shows that the parties did not contemplate such a commission.

The Court of Chancery's decision in *Merck* is instructive. In that case, the court granted the defendant-buyer's motion to dismiss for failure to state a claim based on the interpretation of an acquisition agreement, specifically whether the buyer agreed to assume liability for product liability claims related to products sold by the seller prior to the closing date. *Merck & Co. v. Bayer AG*, 2023 WL 2751590, at *1 (Del. Ch. Apr. 3, 2023), *aff'd*, 308 A.3d 1190 (Del. 2023). The seller advocated for an interpretation under which those liabilities would automatically transfer to the buyer upon the expiration of a 7-year period. But the court noted "there [was] no mechanism in the [contract] by which these liabilities would be transferred upon expiration." *Id.* at *9. Further, "[i]f the parties had intended for [the buyer] to

assume the [liabilities]," the court reasoned "one would expect the [contract] to include mechanisms by which [the buyer] could, for example, exercise some degree of influence concerning the litigation of the relevant Product Claims." *Id*. at *13. In light of the absence of these expected mechanisms, the court concluded that the seller's interpretation was not "commercially reasonable." *Id*.

Here, the FAME Agreement is similarly lacking in the mechanisms one would expect to see in an agreement providing for a fee on stock. There are no mechanisms by which to value stock for purposes of a commission, to determine when a commission on stock is due, or to determine the form in which a commission is to be paid. As in *Merck*, this is strong evidence that the parties did not intend a fee on stock. *See also Hongbo Han v. United Continental Holdings, Inc.*, 762 F.3d 598, 601 (7th Cir. 2014) (finding ambiguity in the term "mileage" in a frequent flyer program agreement because the agreement was silent on the method for determining the number of miles to be credited, which the court found was a matter "naturally within the scope of the contract"); *Vogel v. Boris*, 2023 WL 5471400, at *9 (S.D.N.Y. Aug. 24, 2023) (citing *Langshaw v. Appleby Sys., Inc.*, 2006 WL 3026202, at *2 (Del. Super. Oct. 20, 2006)) ("Delaware courts have recognized 'ambiguity in [a] provision due to the fact that the contract was silent' on another issue.").

Accordingly, the FAME Agreement, when read as a whole rather than cherry-picking words in isolation, is at best ambiguous as to whether stock is commissionable "marketing income." The extrinsic evidence is undisputed—the parties never discussed whether stock was commissionable—and no fact supports FAME's claim otherwise. As set forth below, the doctrine of *contra proferentem* requires that ambiguity to be construed against FAME as the drafter.

## IV. CONDITIONAL CROSS-ASSIGNMENT OF ERROR NO. 2 THE TRIAL COURT FURTHER ERRED IN NOT APPLYING THE DOCTRINE OF *CONTRA PROFERENTEM*.

### A. Question Presented

In the event the Court does not affirm the Trial Court's judgment based on the statute of limitations, whether, based on ambiguity as to whether stock is commissionable, the Trial Court erred in not applying the doctrine of *contra proferentem*. (A641-45.)

### B. Scope of Review

See discussion *supra* at Section II.B.

### C. Merits of Argument

Because the Trial Court concluded the FAME Agreement to unambiguously provided for a fee on stock, it did not reach the issue of whether the doctrine of *contra proferentem* should apply to construe ambiguity against the drafter. But, as set forth above, the FAME Agreement is at least ambiguous as to whether stock is commissionable, and the doctrine of *contra proferentem* thus requires that ambiguity to be construed against FAME.

The doctrine of *contra proferentem* is rooted in the common-sense principle that, "as the entity in control of the process of articulating the terms of the agreements, it is incumbent on the drafter to make their terms clear." *Buckeye Partners, L.P. v. GT USA Wilmington, LLC*, 2022 WL 906521, *10 (Del. Ch. Mar.

29, 2022) (cleaned up). Here, Falk completely controlled the process of drafting the FAME Agreement.

Falk proudly explained his paternalistic approach toward drafting the FAME Agreement. He testified that "because our clients are very unsophisticated, this contract is written so that a person doesn't have to be a lawyer, a financial advisor, an expert in taxation to understand very simple terms." (A247, 137:16–20.) But "[t]he good news," according to Falk, "is they don't have to be sophisticated because they have someone [*i.e.*, Falk] who was looking out for his interests that was sophisticated and cared enough about him … [t]o do what was best for him whether or not it was good for me." (A244, 126:2–9.) In short, Falk simply expected Turner to trust him and not be concerned with the details. In Falk's mind, "[t]here was no need to have a conversation with Evan Turner about how equity … would be commissioned." (A269, 228:10–12.)

As FAME acknowledges, Turner was "very unsophisticated" at the time he entered into the FAME Agreement. (A244, 125:18–21.) Turner was just 22 years old then, and still relying on his mom to help him navigate the strange new world of NBA stardom. (A367, A369, A372-373, 27:5–28:17, 36:4–11, 49:24–50:17.) Falk,

on the other hand, was a 60-year-old attorney and self-described master negotiator, who had literally written the book on how to negotiate contracts in the sports world.[3]

Although there was some back-and-forth between Falk and Turner that resulted in Falk agreeing to lower his fees, Falk denies there was any "negotiation" of the FAME Agreement. (A244, 128:11 ("I didn't negotiate it.").) Falk believes it beneath him to negotiate with his clients given his "track record." (*Id*. at 128:13–19.) Instead, according to Falk, his agreement to lower his commission rate to 15% on marketing income up to $2 million was simply a "gift." (A245, 129:9–21.)

Nor is there any evidence supporting FAME's assertion that Turner had a lawyer review the FAME Agreement. FAME cannot come up with a name, firm, or even a single document or privilege log entry indicating an attorney was involved on Turner's behalf, much less any evidence that said unknown attorney did anything to level the wildly imbalanced playing field between Falk and Turner. Indeed, Falk testified that "virtually nothing changed" in the FAME Agreement as a result of the alleged unknown attorney's involvement. (A256, 175:1–13.) "[Turner] signed off on the contract exactly as it's written." (A270, 229:9–15.)

Even assuming Falk indulged in discussions with an attorney purporting to represent Turner—which Turner denies—it amounted to nothing. As Falk testified,

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3 David Falk, THE BALD TRUTH (2009).

"I have written this same agreement, essentially this same agreement, for 50 years with hundreds of players," and "they all have financial people, they have very sophisticated financial people and lawyers and advisers around them." (A243, 123:3–15.) Turner was no different. Falk was not going to "turn the world upside down for Evan Turner." (A257, 179:7–180:8.) "And so, you know, I told Evan at the very beginning, you know, … we weren't going to change the terms," Falk testified. (*Id*. at 178:11–14.) "This is the way we operate." (*Id*.)

Delaware courts are not hesitant to grant summary judgment on the basis of *contra proferentem* where, as here, the material facts are not genuinely disputed and here, there is no dispute that whether stock was commissionable was not discussed. *See, e.g.*, *Twin City Fire Ins. Co. v. Del. Racing Assoc.*, 840 A.2d 624, 627 (Del. 2003); *Hampton v. Titan Indem. Co.*, 2017 WL 2733760, at *6 (Del. Super. June 23, 2017). *Contra proferentem* is merely a tool used by the Court in resolving contractual ambiguity, and "[t]his task may be accomplished by the summary judgment procedure in certain cases where the moving party's record is not prima facie rebutted so as to create issues of material fact." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783–84 (Del. 2012).

Here, the material facts are beyond dispute, calling for application of the doctrine of *contra proferentem*. Accordingly, in addition to its error in not recognizing the ambiguity in the FAME Agreement, the Trial Court further erred in

not applying the doctrine of *contra proferentem* to construe that ambiguity against FAME.

## CONCLUSION

Appellees respectfully request that the Court deny FAME's appeal and affirm the entry of judgment in favor of Appellees. However, should the Court find that the Trial Court erred in holding FAME's breach of contract claim time-barred, Appellees respectfully request that the Court grant Appellees' cross-appeal, holding that FAME never had a right to a commission on stock because the FAME Agreement is ambiguous on that point and must be construed against the drafter.


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## CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2025, the foregoing ***[PUBLIC VERSION] Defendants-Below, Appellees' Answering Brief on Appeal and Opening Brief on Cross-Appeal*** was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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